83 - 2058

No. ——

Office - Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. In order to resolve issues remaining on remand, when may the district court reopen the record and take additional evidence when the court of appeals did not so direct and evidence on the issues was presented at the original trial?

II. Does the separation of liability and damage issues established in the constitutional case of *Mt. Healthy School Board of Education v. Doyle*, 429 U.S. 274 (1977), apply in ADEA cases?

III. Did the Fourth Circuit misconstrue the record to justify its decision that the District Court's "conclusions" were clearly erroneous?

IV. Even if the District Court's "conclusions" were clearly erroneous, should Smallwood, nevertheless, be awarded back pay from the time of the discrimination through the second trial as allowed under similar circumstances by the Third Circuit in *Rodriguez v. Taylor*, 569 F.2d 1231 (1977), and the Eighth Circuit in *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (1980)?

V. When a defendant has willfully violated the ADEA, may it avoid a damage award by attempting to prove that the plaintiff does not meet certain subjective and non-job related criteria?

VI. Did the Fourth Circuit err in denying Smallwood's cross-appeal?

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OPINIONS BELOW

Smallwood v. United Airlines, Inc., 661 F.2d 303, 26 F.E.P. 1655, 27 E.P.D. ¶ 32130 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007, 73 L.Ed.2d 1302, 102 S.Ct. 2299 (1982).

Smallwood v. United Air Lines, Inc., 728 F.2d 614, 33 E.D.P. ¶ 34185, 34 F.E.P. 217 (4th Cir. 1984).

JURISDICTIONAL STATEMENT

Pursuant to Section 1254(1) of Title 28 of the United States Code, this Court has jurisdiction to review the decision of the Fourth Circuit in this matter dated and entered February 28, 1984.

STATUTES INVOLVED

The pertinent statutes are 29 U.S.C. §§ 621, 623, 626 (1975); 29 U.S.C. § 216 (1965); and Rule 52 of the Federal Rules of Civil Procedure. The text of these statutes in relevant part is provided in the Appendix.

STATEMENT OF CASE

This is the second time this case has come before this Court. The factual background is as follows:

On August 22, 1977, Smallwood applied to United for a position as a pilot/flight engineer. (9/20/82 Trans., p. 63). At that time, he was 48 years old. (Plaintiff's Exhibit No. 1, 1st Trial). After reviewing his application, United rejected Smallwood's application because he was over 35 years of age. United's policy at the time was not even to consider applicants over 30 years old. (8/24/77 Letter to Smallwood, Plaintiff's Exhibit No. 2, 1st Trial). United did not interview Smallwood, investigate any of his credentials, or verify any of the information on his application. (9/20/82 Trans., pp. 40-41, 46-48). Smallwood filed a notice of intent to sue with the Labor Department and thereafter filed suit against United for violation of the Age Discrimination in Employment Act (ADEA) pursuant to 28 U.S.C. § 1331(a) (1977). (3/24/78 Letter to Department of Labor). United answered and ultimately raised as its only defense that its hiring policy was a bona fide occupational qualification (BFOQ). Both parties conducted discovery. Despite its original denial of Smallwood's qualifications, United abandoned this denial by objecting, both at the pretrial conference and at the original trial, to Smallwood's proffered exhibits regarding his qualifications, stating that such evidence was irrelevant to the issues for trial. (11/28/79 Trans., p. 23; Objection to Plaintiff's Exhibits for Trial, Docket No. 45). At the original trial, United stipulated to Smallwood's prima facie case of liability and damages. (11/28/79 Trans., pp. 3-4, 7-8). United then presented evidence on its BFOQ defense and

its evidence that Smallwood would not have been hired for the job even absent discrimination. (11/28/79 Trans., pp. 102-03). This "wouldn't have hired anyway" defense was raised for the first time at trial. (11/28/79 Trans., p. 109).

After hearing the evidence, the District Court ruled that United had established a BFOQ and dismissed the case. Because of its BFOQ ruling, the District Court did not reach the "wouldn't have hired anyway" defense raised by United. *See, Smallwoood v. United Air Lines, Inc.*, 661 F.2d 303, 306, n.3 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982). Smallwood appealed the District Court's decision and the Fourth Circuit reversed. *Id.* The matter was remanded for further proceedings in the District Court. *Id.* United's Petition for a Writ of Certiorari to this Court was denied. *Id.*

On remand, at the pretrial conference, it became apparent that United intended to submit additional evidence on its "wouldn't have hired anyway" defense. Accordingly, Smallwood filed a Motion for Clarification of Issues on Remand, contending that no further evidence should be allowed as the record on that issue was closed in the original trial, and no adequate grounds existed to reopen the record. The District Court rejected Smallwood's position and allowed United to reopen the record and present additional evidence on its "wouldn't have hired anyway" defense. (9/10/82 Trans., pp. 11-17).

At the September 20, 1982, hearing (the "second trial"), the parties stipulated to Smallwood's evidence that he was still qualified for the job and to damage evidence. (9/20/82 Trans., pp. 4-10). United then put on its additional evidence regarding the "wouldn't have hired anyway" defense. This evidence consisted of supplementing the earlier record regarding Smallwood's employment history with his former employer, Overseas International Airlines ("ONA"), and did not involve any issue of medical, psychological or job qualifications aris-

ing subsequent to the original hearing. United presented additional evidence on its theory that Smallwood would not have been hired, if it had processed his application, because he had allegedly defrauded his former employer, ONA, and misrepresented his employment status with ONA on his application. The evidence, as admitted by United's own witness, showed that Smallwood was *not* terminated by ONA but was still an employee at the time of his application. (*See, e.g.*, 9/20/82 Trans., p. 46). After all the evidence was submitted, the District Court rejected United's "wouldn't have hired anyway" defense and awarded Smallwood judgment, including damages, liquidated damages, costs, attorneys' fees, and injunctive relief ordering United to process Smallwood's application as it would have any other applicant's in August 1977.[1]

From these decisions of the District Court on remand, both parties noted appeals. United appealed the District Court's award of damages and injunctive relief as procedurally incorrect and clearly erroneous based upon the evidence presented at the second hearing. Smallwood cross-appealed the reopening of the record, and the District Court's failure to (1) include pension benefits in the liquidated damage award, (2) award all costs incurred and (3) award Smallwood damages from the time the first flight officer was hired following the discriminatory act. The Fourth Circuit dismissed Smallwood's cross-appeal without discussion, and reversed the District Court's judgment for Smallwood as clearly erroneous.

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[1] This was the injunctive relief Smallwood requested. He at no time sought court-ordered employment with United but only a fair consideration of his application for employment.

ARGUMENT

This Petition presents the Court with an opportunity to settle several important questions, substantive and procedural, which have arisen as the lower courts have interpreted and applied the Age Discrimination in Employment Act. In addition, it calls for this Court to exercise its supervisory powers in reviewing the Fourth Circuit's reversal of the District Court's findings for the Plaintiff as clearly erroneous.

I. IN ORDER TO RESOLVE ISSUES REMAINING ON REMAND, WHEN MAY THE DISTRICT COURT REOPEN THE RECORD AND TAKE ADDITIONAL EVIDENCE WHEN THE COURT OF APPEALS DID NOT SO DIRECT AND EVIDENCE ON THE ISSUES WAS PRESENTED AT THE ORIGINAL TRIAL?

In reaching its decision for United, the Fourth Circuit summarily dismissed Smallwood's appeal of the reopening of the record, used the additional evidence as the basis for its opinion against Smallwood and misconstrued the District Court's proceedings to justify its opinion. A brief review of the proceedings below illustrates one of the procedural questions this case presents, the resolution of which will guide all district courts faced with a remand and no directions from the courts of appeal, as well as illustrating the liberties the Fourth Circuit took with the record in order to justify the result it reached.

At the original hearing of this case, both parties presented evidence on liability and damage questions. United specifically put on evidence as to its BFOQ defense and as to its position that even if it had not discriminated against Smallwood, it would not have hired him. (11/28/79 Trans., pp. 101-11, 118-22). The District Court ruled that United had established its BFOQ defense and, therefore, did not reach United's "wouldn't have hired anyway" defense. On appeal, the Fourth Circuit reversed the District Court's BFOQ decision as clearly erroneous

and, noting that the "wouldn't have hired anyway" issue was not resolved at trial "remanded for action consistent with this opinion." *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 309 (4th Cir. 1981). If the District Court had not erred in its BFOQ decision, the damage questions would have been resolved at the original trial.

On remand, when it became obvious from United's discovery requests that it intended to submit additional evidence on the "wouldn't have hired anyway" defense, Smallwood filed a motion for clarification of the issues on remand. In ruling against Smallwood, the trial court decided to reopen the record and allow United to put on additional evidence so that

> if [the case] goes to the Court of Appeals another time, it will be in a position that they can decide it and not send it back here for any more testimony.

(9/10/82 Trans., p. 16).

The trial court made this decision despite the fact that it was

> just not sure that there is any more that [United] ha[s] now that [it] didn't have and couldn't have had at the first trial.

Id. p. 10.

The Fourth Circuit based its reversal of the District Court's judgment for Smallwood on the evidence that was admitted as a result of the District Court's decision to reopen. "Finding no merit" in Smallwood's appeal of this decision, the Fourth Circuit dismissed it with no discussion.

The effect of this decision is to allow, in fact approve of, a trial court reopening the record for additional evidence after every remand in order to make a "better" record for the entry of a final order at the appellate level on the next series of appeals, regardless of the justice to the parties in doing so. Such a proceeding is so far from the accepted and usual course of proceedings as to

call for the exercise of the Court's supervisory function. If left undisturbed, this precedent will undoubtedly result in court dockets being further backlogged. It also penalizes plaintiffs like Smallwood who, but for the error of the district court at the original trial, should have their case decided on the record established at the first trial. United agrees there is a lack of guidance on this issue, stating that reopening is governed only by the discretion of the trial court. (United's Reply Brief to Fourth Circuit p. 23). Thus, this case presents the opportunity to establish the standards for the proper reopening of the record on remand, other than to prepare a "better" record for appeal.

This case presents a good procedural background to establish the standard. Because evidence on the "wouldn't have hired anyway" defense was presented at the first trial, on remand the District Court was certainly able to decide the issue on the existing record. For the reasons stated above, it did not do so. Therefore, an unnecessary hearing on this issue was required, and as a result of that new evidence, the District Court's decision for Smallwood was reversed on appeal as clearly erroneous.

Not only did the Fourth Circuit dismiss Smallwood's cross-appeal, but the Fourth Circuit misconstrued the trial court's actions as allowing two hearings on a bifurcation of violation and remedies issues.

> The district judge made it clear throughout the first trial in this case that he was considering only the violation issue. Thus, he repeatedly—ultimately, with considerable emphasis and finality—ruled that he would not permit the defendant to inquire either on cross-examination of the plaintiff or by direct evidence fully into the [basis of the wouldn't have hired anyway defense]. He in effect by these rulings bifurcated the two issues in this case.

728 F.2d 614, 619. This statement is made despite the parties stipulation as to damages at the first trial (11/

28/79 Trans., pp. 3, 7-8). Far from bifurcating the proceedings, the District Court at the first trial made it clear that damages were the only issue to which the evidence was relevant and that any restraints on United's presentation were due to evidentiary rulings on the way in which it was presented. A review of the transcripts shows the Appellate Court's misconstruction of the District Court proceedings. (*See*, for example, 11/28/79 Trans., pp. 3-4, 101-11, 119-22, 213-14; 9/10/82 Trans., pp. 5-10). This record clearly calls for an exercise of this Court's supervisory function.

Thus, the first issue in this case presents the Court with opportunity not only to settle the question as to when a district court may reopen the record on remand for additional evidence but also to review the Fourth Circuit's action in this case.

II. DOES THE SEPARATION OF LIABILITY AND DAMAGE ISSUES, ESTABLISHED IN THE CONSTITUTIONAL CASE OF *MT. HEALTHY SCHOOL BOARD OF EDUCATION v. DOYLE*, 429 U.S. 274 (1977), APPLY IN ADEA CASES?

Although neither the parties nor the District Court relied upon or even mentioned *Mt. Healthy School Board of Education v. Doyle*, 429 U.S. 274 (1977), the Fourth Circuit relied upon the decision heavily in reversing the judgment for Smallwood. The Fourth Circuit stated:

> This distinction between the two issues [of liability and damages], involving as they do separate and distinct . . . facts, was initially explicated in connection with a constitutional claim in *Mt. Healthy*, [citations omitted] and was later specifically applied in the employment discrimination context in the companion cases of *Teamsters v. United States*, 431 U.S. 324, 326 [sic] 97 S.Ct. 1843, 1850, 52 L.Ed.2d 396 (1977), and *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403-04 n.9, 52 L.Ed.2d 453 (1977).

728 F.2d 614, 618. The Fourth Circuit then determined that although Smallwood was denied a position with United solely because of his age, he was not entitled to damages because he, in the opinion of the Fourth Circuit, would not have been hired even if he were not the victim of discrimination. In its broad-brush application of *Mt. Healthy*, the Fourth Circuit takes no note of this Court's careful demarcation of *Mt. Healthy* as a constitutional standard nor the procedural contexts of this Court's decisions in *Teamsters* and *Rodriguez*.

Since the decision in *Mt. Healthy*, this Court has consistently referred to the decision as a constitutional one. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977); *Codd v. Velger*, 429 U.S. 624, 630 (1977) (Brennan, J., dissenting); *Carey v. Piphus*, 435 U.S. 247, 260 (1978); *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 n.13 (1979); *NLRB v. Transportation Management Corp.*, —— U.S. ——, 76 L.Ed.2d 667, 676, 103 S.Ct. 2469, ———— (1983).

Despite the Fourth Circuit's opinion, it does not appear that this Court has specifically applied the *Mt. Healthy* standard to the employment discrimination statutes. In the cases cited by the Fourth Circuit, *Mt. Healthy* is mentioned in dicta in a footnote in *Rodriguez* and not mentioned at all in *Teamsters*. In neither of these class action suits was application of the *Mt. Healthy* actually at issue.

In *Rodriguez*, the Court's opinion dealt primarily with the court of appeals' class certification. As none of the class representatives had " 'suffer[ed] the same injury' as the class members," 431 U.S. at 403 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)) a class action prerequisite was not met and, thus, certification was not improper. The representatives

were not injured because they could not make the prima facie showing that they were qualified for the job. Lacking job qualifications, no determination of discrimination was made.

In dicta, this Court stated:

> Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event. See, e.g., Teamsters v. United States, ante, at 369 n.53. . . . Cf. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-87. . . .

Id. at 403 n.9.

Clearly, this dicta does not constitute specific application of the *Mt. Healthy* standard. At best, it establishes a class action procedure. In a class action, this procedure is necessary since a determination of a discriminatory practice raises only a presumption or inference of individual class members' entitlement to relief. At an individual relief or "damage" hearing, the individual "bear[s] the burden of coming forward with the basic information about his qualifications. . . . [T]he burden will then be on the employer to show [the individual] was nevertheless not a victim of discrimination." *Teamsters*, 431 U.S. at 369 n.53.

Such a procedure makes no sense in a non-class action like Smallwood's. Smallwood established his qualifications at trial and United did not refute or rebut them. There was a clear finding of liability. Thus, the rationale in the dicta in *Rodriguez* does not apply to Smallwood. If it is analogous to any case citing *Mt. Healthy*, Smallwood's case is most closely analogous to Bakke's in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 n.54 (1978).

The procedural dissimilarity with *Teamsters* is equally striking. In *Teamsters*, the primary issue was the bona fide seniority system exemption from Title VII liability. Again, in a class action context, the employer's "liability", 431 U.S. at 360, had already been established, creating an inference that any employment decision made during the time the discriminatory policy was in effect was made pursuant to that policy. At the individual damage hearings, the burden was then "on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362. As with *Rodriguez*, *Teamsters* is not a specific application of the *Mt. Healthy* standard and the application of the *Teamsters* rationale makes no sense in the context of Smallwood's case.

Thus, it does not appear that this Court has applied the *Mt. Healthy* standard to the employment statutes. Accordingly, the Fourth Circuit's application of *Mt. Healthy* to the ADEA to defeat a damage award to a victim of age discrimination decides an important question of federal law which has not been, but should be, settled by this Court. The Court should grant Smallwood's Petition for Writ of Certiorari to settle this question.

III. DID THE FOURTH CIRCUIT MISCONSTRUE THE RECORD TO JUSTIFY ITS DECISION THAT THE DISTRICT COURT'S "CONCLUSIONS" WERE CLEARLY ERRONEOUS?

Rule 52 of the Federal Rules of Civil Procedure provides that

> [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

See also, United States v. United States Gypsum Co., 333 U.S. 364 (1948). Despite this clear standard, the Fourth Circuit went out of its way to construe the record in

such a manner as to ignore totally the evidence that supported the District Court's decision for Smallwood. A review of the record shows that the Fourth Circuit substituted its judgment for that of the District Court. Thus, there is the need for this Court to exercise its supervisory powers over the Fourth Circuit's activity.

At the first trial, in attempting to show that Smallwood would not have been hired, United introduced the testimony of J. D. Smith. In response to United's questioning, Smith stated:

> A. If we were advised that an arbitration decision supported *a defrauding activity*, that would have terminated the processing of the individual.
>
> Q. What effect does *falsification of an application* have upon the hire process at United?
>
> A. The same process that terminated the interview or the screening process. That's spelled out in our program.

(11/28/79 Trans., p. 122) (emphasis added).

United did not establish that Smith was on the board which makes employment decisions for United. Moreover, United's evidence did not establish an arbitration decision [2] supporting fraud by Smallwood nor any falsification of his employment application. (*See* 11/28/79 Trans., pp. 100-11). This is the state of the evidence at the original trial. On this record, the District Court's ruling in rejecting the "wouldn't have hired anyway" defense is clearly correct.

At the second trial, September 20, 1982, the District Court heard United's witness, Volz, testify to the fact that not only was it United's policy not to hire applicants who allegedly misrepresented facts on their employment

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[2] The arbitration decision and Referee's opinion did not even exist at the time United rejected Smallwood's application. They did exist at the time of the first trial, but were not offered into evidence by United.

application and attempted to defraud previous employers (9/20/82 Trans., pp. 43-44), but also that (1) the decision not to hire for these reasons was made by United's personnel department or hiring board, not Volz alone (9/20/82 Trans., pp. 13-14); (2) United never processed Smallwood's application to the point of discovering these alleged deficiencies before deciding not to hire him; although if United had processed the application, it certainly would have discovered the alleged deficiencies (9/20/82 Trans., pp. 21, 41-42, 51-52);[3] (3) that other applicants cited by United as establishing the aforementioned policies were interviewed by United (United's Opening Brief to the Fourth Circuit, p. 14) and were given an opportunity to discuss any of United's concerns; (4) Smallwood was not given such an opportunity to discuss these matters with United (9/20/82 Trans., pp. 47-48); and (5) Smallwood was in fact an employee of ONA at the time of his application to United (9/20/82 Trans., p. 46). Thus, United's evidence on this point is not as clear as the Fourth Circuit's opinion indicates.

Added to this is Smallwood's rebuttal testimony that no fraudulent activities or misrepresentations existed. In regard to the alleged application misrepresentation, counsel for United asked Smallwood on cross examination:

> Q. Well, you weren't flying for Overseas National Air Lines, were you? You had been discharged? The company had taken actions to discharge you, had they not?
>
> A. They had taken—sent me a letter to say that my services were terminated, that is correct.
>
> Q. Did you bring that to the attention of United Air Lines in any fashion?
>
> A. No. I felt the way I filled out my application would be the most objective and honest way to do it.

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[3] Although United's testimony was unqualified in this area, it should be noted that in the two years between Smallwood's application and the original trial, United did not obtain the evidence involved.

> I gave the name and address of my present employer, which I know that every airline or every employer is going to check with. They will check with them. They will find out what ONA says. They will call me, and then find out what I say. And between that development I believe that United would have hired me. There are a lot of reasons for that ONA's action that did not appear in the decision of the board.

(9/20/82 Trans., pp. 72-73). It was precisely this testimony that the District Court found convincing, stating:

> Had there been an absence of the discriminatory rejection because of age, then a suitable inquiry would have been made as to whether or not this plaintiff was an employee, whether or not his activity with his former employer was such that it would warrant the defendant from rejecting him as an applicant. As I say, that inquiry has been foreclosed by what has now been determined to be a discriminatory act on the part of the defendant.
>
> It seems to me the stating that he was an employee is robbed of some of its sinister character by the fact that his former employer was listed. It was reasonable to assume that his prospective employer, United, would contact his former employer, where that former employer would give its view of whether he was still an employee, what were the circumstances under which he was terminated, if he was actually terminated, and then, as did happen in all of the other instances in which terminations or refusal to continue with the processing of applications, the applicant himself would have been either interviewed routinely or some conversation with him had so that he could have had at least have given his side of the story. That was not done here.

(9/20/82 Trans., pp. 98-99).

It was the District Court who heard the testimony of Volz and Smallwood and could weigh their credibility and observe their demeanor. The fact that the District

Court found Smallwood more convincing than Volz is not grounds for reversing its judgment.

Moreover, it must be noted that the documentary evidence supports the District Court's decision. Under the collective bargaining agreement between the Air Line Pilots Association and ONA, "employee" is defined as "a pilot whose name appears on the pilot's seniority list . . . ." (9/20/82 Trans., p. 59). Smallwood's name was, or should have been, on that list. (9/20/82 Trans., pp. 66-67). There is also nothing in the Grievance Procedure section of that contract which indicates that a pilot pursuing a grievance is no longer an employee. Rather, a pilot in a grievance proceeding is merely "held out of service" but continued on the payroll. (Section 21(A)(2), ONA Collective Bargaining Agreement, Plaintiff's Rebuttal, Second Trial). Also, Smallwood asked the attorney who represented him in the ONA grievance procedure what his status was with ONA during the pendency of that procedure and was told "You're an employee." (9/20/82 Trans., p. 60). Finally, during the pendency of the procedures, Smallwood regularly received mail from ONA and the Air Line Pilots Association (ALPA), including mail addressed to "All Employees," "All ONA Pilots" and the like. (Plaintiff's Rebuttal Exhibits, Second Trial). Clearly, Smallwood in good faith thought he was still an employee, and, it is submitted, was in fact an "employee" and so regarded by ONA. In fact, United's witness admitted that Smallwood was an employee at the time of his application. (9/20/82 Trans., p. 46). Thus, there can be no "misrepresentation".

Smallwood's evidence is more than sufficient to justify the District Court's ruling. As the District Court stated in ruling on United's Motion for Clarification following the second trial, "[t]he court's feelings at the time it ruled, as well as now, are that the after-the-fact rationale and testimony of the defendant in this regard, particularly where no opportunity had been given the plaintiff

to explain prior transactions with his former employer, were just not persuasive." (App. p. 83).

As the District Court was entitled to judge the credibility of witnesses, weigh the evidence and to be skeptical of United's post-event rationalization for not hiring Smallwood, *Cova v. Coca Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 961 (8th Cir. 1978); *Hodgson v. First Fed. Sav. & Loan Ass'n. of Broward Co., Fla.*, 455 F.2d 818, 824 (5th Cir. 1972) and as its findings were supported by Smallwood's testimony and documentary evidence, the District Court's rulings were not clearly erroneous and, therefore, are not subject to reversal.

Despite this evidentiary basis for the District Court's decision, the Fourth Circuit ignored all of the evidence supporting Smallwood and devoted ten pages of its opinion to reciting events that occurred with Smallwood and ONA, before Smallwood ever applied to United. The Fourth Circuit referred to Smallwood's "discharge" by his former employer (ONA) and quoted the "discharge" letter. This was done even though the evidence was clear that, as a result of the Board of Adjustment decision, Smallwood was not discharged, but remained an employee. (Decision of the Board, Defendant's Exhibit No. 1, Second Trial). The Fourth Circuit engaged in a detailed review of the opinion of the Referee in the arbitration between ONA and Smallwood. This is simply the opinion of one man, and not the decision itself. The Fourth Circuit quotes, not the Referee's opinion itself, but the Referee's *summary* of ONA's argument against Smallwood. 728 F.2d at 622. This argument is established as "fact" by the Fourth Circuit. *Id.* However, the Referee's summary of Smallwood's argument is treated as merely "assert[ions]." *Id.* Clearly, the Fourth Circuit is not only putting itself in the trial court's role of judging the credibility of witnesses and finding fact, but is misconstruing the evidence as well.

The Fourth Circuit's review of the arbitration proceeding is so detailed that one loses sight of the fact that it

is Smallwood's suit against United, not Smallwood's grievance against ONA, which is on appeal. Reading the Fourth Circuit's opinion, it appears that the Fourth Circuit was so offended by the contents of the Referee's opinion that it completely overlooked the question at hand, namely, were the District Court's findings clearly erroneous? The Fourth Circuit apparently reached the decision it wanted to reach, despite the evidence and standards of review. The Fourth Circuit did not mention any of the evidence, cited above, which supported the District Court's decision. In short, the Fourth Circuit did precisely what the District Court repeatedly refused to do at the first hearing—it tried whether or not Smallwood was rightfully discharged by ONA. This was not the issue before the District Court, nor the Court of Appeals. The question presented was, given the fact of the arbitration decision (not whether or not that decision was correct), would United refuse Smallwood's employment absent discrimination. For the reasons stated above, the District Court was not convinced such would have been the case. That decision was not properly subject to reversal because there was evidence to support it.

The Fourth Circuit, ignoring the evidence supporting the District Court's decision, and emphasizing United's evidence, apparently reached the decision it wanted to reach. As has been fully briefed in the Petition for a Writ of Certiorari in *Phyllis A. Anderson v. City of Bessemer, City, etc.*, 717 F.2d 149 (4th Cir. 1983), *cert. pet. pend.*, No. 83-1623, the Fourth Circuit's action in this case appears to be consistent with its apparent pattern of *de novo* review and reversal of district court decisions in favor of plaintiffs in employment discrimination cases. This calls for the exercise of this Court's supervisory function to, at a minimum, investigate this pattern so as to prevent undermining the principles and policies of fair employment opportunities mandated by federal statutes.

IV. EVEN IF DISTRICT COURT'S "CONCLUSIONS" WERE CLEARLY ERRONEOUS, SHOULD SMALLWOOD, NEVERTHELESS, BE AWARDED BACK PAY FROM THE TIME OF THE DISCRIMINATION THROUGH THE SECOND TRIAL AS ALLOWED UNDER SIMILAR CIRCUMSTANCES BY THE THIRD CIRCUIT IN *RODRIGUEZ v. TAYLOR*, 569 F.2d 1231 (1977), AND THE EIGHTH CIRCUIT IN *HOUGHTON v. McDONNELL DOUGLAS CORP.*, 627 F.2d 858 (1980)?

Smallwood's case presents the substantive question as to when back pay can and should be awarded a plaintiff who although a victim of employment discrimination, ultimately is found not to be qualified for the job. The Third Circuit in *Rodriguez v. Taylor*, 569 F.2d 1231, (1977), *cert. denied*, 436 U.S. 913 (1978), and the Eighth Circuit in *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (1980) have ruled that a plaintiff, otherwise unqualified, may recover back pay under certain circumstances. By misconstruing the record, the Fourth Circuit avoided deciding the issue directly. Dicta in its opinion, however, indicates that the Fourth Circuit finds such a rule "untenable."

In *Rodriguez*, the City of Philadelphia had rejected Rodriguez's application for a Security Officer I position due to his age. Rodriguez filed suit on behalf of himself and all persons over 41 in the Eastern District of Pennsylvania. After a bench trial, the District Court enjoined the City from use of its age limitation as to the entire class. In addition, it ordered the City to give Rodriguez the employment test. If he passed, he was to be hired with full retroactive benefits. The court further ordered that whether or not Rodriguez passed the exam, he was entitled to back pay from the date the first applicant was hired subsequent to the discrimination and the date the final order was entered. Liquidated damages and attorneys' fees were also awarded.

The City appealed to the Third Circuit. Pending the appeal, Rodriguez was administered and failed the employment test. Rejecting the City's argument that the back pay award was erroneous since Rodriguez was not "qualified" for the job, the Third Circuit affirmed the back pay award. Two factors predominate in the court's opinion: (1) one of the goals of a back pay award is to deter employers from discriminating in employment decisions, and (2) the City failed to come forward with evidence of Rodriguez's disqualification at trial. Both of these factors are present in Smallwood's case as well.

United admittedly refused to consider for employment any applicant over 35 years of age. Such practice was found not to be a BFOQ. It is precisely this type of knee-jerk reaction to age that the ADEA was enacted to deter. As stated by the Third Circuit:

> The Age Discrimination in Employment Act of 1967 was enacted to ensure that employers base their hiring decisions on expectations of individuals' job performance rather than on unwarranted irrebuttable presumptions that all persons of a certain age less than 65[4] would be unable to satisfactorily perform a given job.

Id. at 1236. *See also* 29 U.S.C. § 621(a)(2),(b) (1975). United's 35-year rule totally frustrated this policy. This willful frustration occurred despite the easy method available to United to comply with the most basic of equal employment principles—it had only to process fairly Smallwood's application as it would have processed any 34-year old's application. Had it done so, any disqualifying factors would have been discovered contemporaneously with the employment decision and the purpose of the ADEA fulfilled. United's and other employer's frustration of the ADEA should be deterred by an

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[4] The ADEA was subsequently amended to protect individuals aged 40 through 70 years. 29 U.S.C. § 631(a) (1978).

award of back pay. This Petition gives the Court an opportunity to effectuate the deterrance policy created by an award of back pay.

A contemporaneous examination of an applicant's job qualifications serves another valuable purpose—the employer is prepared to meet its burden *at trial* on the issue of whether or not the plaintiff would have been hired for the job but for the discrimination. The City of *Rodriguez* failed to meet its burden and the trial court awarded back pay, in part, because of it. United failed to meet its burden at the first trial and should also be obligated for back pay because of it.

Although United knew of Smallwood's grievance procedure with ONA before the first trial (*see, e.g.*, Smallwood 8/24/79 Deposition, pp. 23, 27-28), it failed to obtain a copy of that decision before trial. It was this failure that was the basis of the District Court's evidentiary rulings at the first trial—the rulings used by the Fourth Circuit to hold that the case was bifurcated. By failing to process Smallwood's employment application and failing to prepare properly its case for trial, United failed to meet its burden at the first trial. (Even with its supplemental evidence, the District Court still found United had failed to meet its burden.) When a defendant, whose liability in an employment discrimination case is clear, fails to meet this burden at trial, it should be obligated to pay back pay from the time of the discrimination until the final order is entered. This back pay should be awarded even when later-developed evidence shows the existence of a non-discriminatory basis which, if known at the time, would justify the defendant's failure to hire plaintiff. Any other rule rewards the defendant's discrimination and inadequate trial preparation by allowing it to defeat a back pay award by reopening the record to present or supplement evidence. This Petition presents the Court with the opportunity to prevent this dilatory, inadequate trial preparation which

frustrates the goal of finality in litigation and backlogs the court's dockets, as well as fulfilling the deterrence goal of the ADEA.

In *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (8th Cir. 1980), the Eighth Circuit also awarded an ADEA plaintiff back pay although the trial court had determined that the plaintiff was medically disqualified for the three years from the discriminatory act until the final order was entered. At the original trial, McDonnell Douglas attempted to defend as a BFOQ its age-based decision to remove Houghton from his test pilot status. The trial court's decision for Houghton was reversed by the Eighth Circuit and remanded to the trial court for a determination of Houghton's then physical ability to resume test pilot responsibilities. If he was not presently qualified, the trial court was to determine the time of disqualification and award damages accordingly. The Eighth Circuit made this ruling in February 1975 when Houghton was 55 years and 4 months old. On remand, the trial court found that Houghton was medically disqualified at age 52, the time when McDonnell Douglas has removed him from test pilot status. Finding him disqualified on a factor other than age, the trial court denied back pay. On appeal, the Eighth Circuit reversed and granted back pay from the time of discrimination until the commencement of the first trial. Similar to *Rodriguez*, the foundation of the opinion appears to be (1) the discriminatory removal of plaintiff based solely on age, and (2) the defendant's failure to present sufficient evidence at the first trial.

Again, Smallwood fits into this decision. By creating the fiction that the trial court bifurcated the liability and damage issues in this case, the Fourth Circuit avoided a decision contrary to the rule established in two other circuits. However, there can be no doubt that the result reached in this case puts the Fourth Circuit in conflict with two other circuits on this important sub-

stantive question in age discrimination cases. This situation calls upon this Court to exercise its discretion and grant this Petition to resolve this issue of back pay to a job applicant who has been the victim of employment discrimination.

V. WHEN A DEFENDANT HAS WILLFULLY VIOLATED THE ADEA, MAY IT AVOID A DAMAGE AWARD BY ATTEMPTING TO PROVE THAT THE PLAINTIFF DOES NOT MEET CERTAIN SUBJECTIVE AND NON-JOB-RELATED CRITERIA?

United's defense to damages is that Smallwood's employment history with ONA allegedly establishes dishonesty and that, therefore, he would not have been hired in any event. Since he was not "qualified" for the position, he was not damaged by United's discrimination. This case presents the substantive question as to whether or not the factor asserted by an ADEA defendant, once liability has been established, to defeat a damage award, must be an objective, job-related factor. This question is particularly important where, as here, the factor was not discovered or asserted until years after the employment decision was made.

Related questions are whether or not honesty or integrity is an objective, job-related factor and whether or not a trial court can and should be skeptical of non-objective, non-job-related factors asserted after the fact.

In ruling on Smallwood's argument, the Fourth Circuit seems to agree that the factor asserted must be job-related. 728 F.2d at 625-26. In so ruling, the Fourth Circuit seems to be in accord with other jurisdictions which have ruled on the question. *Murnane v. American Air Lines*, 667 F.2d 93, 102 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *EEOC v. Goodyear Tire & Rubber Co.*, 22 F.E.P. 786, 787 (W.D. Tenn. 1980). *See also, East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 400 (1977); *Rodriguez v. Taylor*,

569 F.2d 1231 (3rd Cir. 1977). However, the opinion goes on to state that honesty is so job-related that the alleged lack of it defeats Smallwood's entitlement to damages. The argument is so expansive as to eliminate job-relatedness as a necessary element in the damage defense. According to the Fourth Circuit:

> What the plaintiff contends[5] is that trustworthiness, reliability and honesty are in no way required or expected of a pilot of a large commercial plane, to whose substantially unsupervised competency, trustworthiness, reliability, and fidelity to the rules and regulations is committed the safety of the scores of passengers on the plane he pilots. We are unwilling to accept this argument. The logs a pilot maintains, the accuracy of his reports, the faithful and exacting observance of all safety rules and regulations and their accurate and punctual recording, all are vital to the safety of the plane's passengers and all depend on the trustworthiness, truthfulness and reliability of that pilot aloft, where he operates largely free from any effective supervision. Any argument that the only qualification of such a flight officer is his mechanical ability to manipulate the various controls of the plane completely lacks conviction.

728 F.2d at 625.

This same argument applies with equal force to virtually any job—truck driver, postman, waiter, mechanic, police officer, child care provider, etc. In fact, honesty

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[5] Smallwood *never* argued that integrity or honesty are not important characteristics for air line pilots, despite this language from the Fourth Circuit. What Smallwood argued was that in a case like this, where liability is established, a defense to damages should not be established on the basis of subjective, non-job related criteria. In addition, the Fourth Circuit assails Smallwood for not attempting to rebut the Referee's opinion. In as much as the District Court made clear that it was not trying the merits of the ONA grievance, Smallwood had no reason to introduce the evidence on his behalf.

is the basic criteria upon which any relationship, employment or social, is based. Precisely because honesty is the universal base of any relationship, holding that the alleged lack of perfect honesty is a defense to damages in employment cases erases job-relatedness as a requirement to a defense to a damage award.

This case presents a solid record upon which to decide these issues. Smallwood's flight records, including required filings and safety proceedings, are impeccable. There is no evidence that he has ever in any way endangered the safety of himself, co-workers, or passengers. To the contrary, Smallwood has been awarded military decorations for his flying, including the Distinguished Flying Cross and the Air Medal with three oak-leaf clusters. The questions raised by United about Smallwood do not at all involve safety and ability to function as a flight officer. Thus, the question presented by this record is, in light of violation of ADEA, can an employer escape a damage award merely by asserting that the plaintiff would never have been hired in any event due to the lack of a subjective criteria? And if so, is honesty such a criteria? These issues are presented to the district courts every time an employment discrimination case is tried. This Petition, if granted and decided, will provide the district courts with a clear legal framework upon which to resolve these issues.

Related to this question is whether or not the finder of fact can and should be skeptical of any alleged disqualifying factors asserted by a defendant, who has been found to have discriminated unlawfully. In this case, Smallwood was rejected solely because of his age. More than two years after this decision, and the day before trial, United allegedly "discovered" [6] Smallwood's griev-

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[6] See 11/28/79 Trans., p. 109. But see also Smallwood 8/24/79 Deposition, pp. 23, 27-28.

ance procedure with ONA and asserted that this would have prevented United from hiring him even if it had not discriminated against him. At the conclusion of the second trial, the District court ruled:

> it seems to me the Court is entitled to be, and should be, skeptical of after-the-fact decisions as to what the defendant would have done had it known what it knows now.

(9/20/82 Trans. p. 98). *See also* App. p. 89.

The District Court's skepticism was supported by decsisions in other circuits. *Hodgson v. First Federal Savings & Loan Ass'n of Broward Co.*, 455 F.2d 818, 824-25 (5th Cir. 1972); *Cova v. Coca Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 961 (8th Cir. 1978); *EEOC. v. Goodyear Tire & Rubber Co.*, 22 F.E.P. 786, 787 (W.D. Tenn. 1980).

In reviewing the District Court's decision, the Fourth Circuit ruled directly contrary to the circuits cited above, stating:

> The idea that the defense, based as it was on undisputed facts, should be dismissed or burdened with a heavy cloak of skepticism because it was an "after-the-fact rationale" is a reason that is completely contrary to the bellwether case in this area of *Mt. Healthy.*

728 F.2d at 623. The Fourth Circuit takes no note of the fact that the defendant in *Mt. Healthy* based its employment decision as to the plaintiff on two factors; one discriminatory, the other legitimate. Thus, *Mt Healthy* is factually very different from Smallwood's case where the employment decision was based solely on discriminatory factors. Accordingly, this case raises questions as to the proper interpretation of *Mt. Healthy* and puts the Fourth Circuit in conflict with two other circuits on this issue.

VI. DID THE FOURTH CIRCUIT ERR IN DENYING SMALLWOOD'S CROSS-APPEAL?

For the reasons stated above, the Fourth Circuit erred in reversing the District Court's decision for Smallwood. Thus, it also erred in denying, without consideration, Smallwood's cross-appeal. This Court should remand for consideration of the merits of Smallwood's cross-appeal.

CONCLUSION

For the reasons presented above, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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